Supreme Court, U.S.

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DOCKET NO.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1997

MIRIAM DONNER,

Petitioner,

v.

CHARLES DONNER,

Respondent

On Petition For Writ Of Certiorari
To the Supreme Court Of Florida

PETITION FOR WRIT OF CERTIORARI

Miriam Donner, Pro Se
P. O. Box 1232
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51 pp

QUESTION PRESENTED FOR REVIEW

Where a Florida state court judgment adverse to Petitioner was affirmed on appeal, where one of the affirming judges, who was essential to the quorum in the appellate panel, negotiated for employment, and became employed, as a name member of the opposing party's law firm, contemporaneous with his participation in the appeal, where Petitioner discovered those concealed facts only after the mandate was issued and after the term of that court expired and thereupon immediately filed a motion to recall the mandate, citing those facts as a due-process violation, did the Florida court violate the Due Process Clause by ruling that, because of the expiration of its term of court, it lacked jurisdiction to consider Petitioner's motion to recall the mandate and her due-process arguments on the merits?

LIST OF ALL PARTIES TO THE FLORIDA STATE COURT PROCEEDING

Miriam Donner

Charles Donner[1]

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[1] Charles Donner is deceased. With the permission of the Florida court, the certificate of service accompanying the motion to recall was amended to reflect service of that motion upon the attorney for the persons appointed as personal representatives of the estate of Charles Donner. Those persons are Edward, Mark, and William Donner. However, Miriam Donner's motion to substitute as parties those persons in their appointed capacities as personal representatives of the Charles Donner estate was denied by the Florida court as "moot" as part of its December 23, 1997 order denying the motion to recall mandate. App. I-III.

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OPINIONS BELOW

Neither the December 23, 1997 order of the district court of appeal, to which this petition is directed, nor the May 18, 1998 order of the Florida Supreme Court denying discretionary review of that order are published in any official or unofficial reporter. Those orders are reproduced at App. I and VI.

The antecedent August 9, 1977 order of the district court of appeal is reported as Donner v. Donner, 349 So.2d 1240 (Fla. Dist.Ct. App. 1977), cert. denied, 365 So.2d 724 (Fla. 1978) and is reproduced at App. VIII.

STATEMENT OF JURISDICTION

Under 28 U.S.C. § 1257(a), jurisdiction is conferred on this Court to review by writ of certiorari the order of the district court of appeal of Florida, denying Petitioner's motion to recall mandate. Paraphrasing that statute, that order was "rendered by the highest court" of the state of Florida "in which a decision could be had" because the Florida Supreme Court denied discretionary review of that order. See Florida Star v. B.J.F., 530 So.2d 286 (Fla. 1988), after certification, 491 U.S. 524 (1989), holding, on a question certified by the U.S. Supreme Court to the Florida Supreme Court, that, where, as here, a district court of appeal order includes a reasoned opinion, the Florida Supreme Court is vested with discretionary jurisdiction to review that order.

Moreover, Petitioner's rights are being "specially set up or claimed under the [Due Process Clause of the Fourteenth Amendment to the] Constitution."

The district court of appeal order, with opinion, was issued on December 23, 1997. A timely motion for rehearing was served and filed (within the required 15 days) on December 30, 1997 and that motion was denied on January 30, 1998. Petitioner's petition to the Florida Supreme Court for review of that order was timely served and filed (within the required 30 days) on Monday, March 2, 1998, and the Florida Supreme Court denied discretionary review on May 18, 1998. See Sup. Ct. R. 13.1.

On August 13, 1998, Justice Kennedy extended the deadline for filing this petition to September 19, 1998.

CONSTITUTIONAL PROVISIONS INVOLVED

U. S. Const., amend. XIV, § 1 provides:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law: ..."

Fla. Const. art. V, § 4(a) provides:

> "There shall be a district court of appeal servicing each appellate district. Each district court of appeal shall consist of at least three judges. Three judges shall consider each case and the concurrence of two shall be necessary to a decision."

STATEMENT OF THE CASE

Miriam Donner sued Charles Donner in Florida state court in 1976. The court entered judgment in favor of Charles Donner. Miriam Donner appealed that judgment to the district court of appeal of Florida. On August 9, 1977, a three-judge panel of that court unanimously affirmed that judgment. App. VIII. One of the judges on that panel was Judge Gerald Mager. On September 15, 1977, Miriam Donner's motion

for rehearing of that affirmance was denied. In 1978, the Florida Supreme Court denied certiorari without opinion. The district court of appeal then issued its mandate. Donner v. Donner, 349 So.2d 1240 (Fla.Dist.Ct.App. 1977), cert. denied, 365 So.2d 724 (Fla. 1978). In 1997, Miriam Donner discovered for the first time that, at least by August 15, 1977, just four business days after that August 9, 1977 affirmance, Judge Mager was already a "name" member of a law firm that had been representing, and continued to represent, Charles Donner on an ongoing basis in regard to the subject matter of that case. Upon making that discovery, Miriam Donner immediately moved in the district court of appeal to recall its mandate of affirmance on several grounds. One ground, timely raised and preserved, was that Judge Mager's negotiation for employment (and his

then-employment) with that law firm contemporaneous with his participation in the required quorum and in the panel decision was a denial of due process violative of the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. That ground was first articulated in the motion to recall the mandate, as follows:

> Appellant Miriam Donner moves the Court to recall and declare void its February 17, 1978 mandate and its August 9, September 15, and September 21, 1977 orders on the following grounds:
>
> (a) One of the judges on the panel in the appeal at bar, (then-Chief) Judge Gerald Mager, was rendered incompetent to participate in the panel by virtue of the facts that, during his participation in the case, he negotiated employment, and accepted employment, with a law firm representing Charles Donner in regard to the subject matter of the claim at issue in the case;
>
> (b) Since a panel is constitutionally required to consist of three judges, (then-Chief) Judge Mager's disqualification deprived the panel of

> the necessary quorum;
>
> (c) Additionally, disqualified (then-Chief) Judge Mager's participation with the other two judges on the panel in their deliberations and vote additionally disqualified those judges;
>
> (d) Appellant was thereby also deprived of due process;
>
> (e) Neither Appellee's law firm nor (then-Chief) Judge Mager disclosed the fact concerning his employment to Miriam Donner and she first discovered those facts within the past 30 days."
>
> " The combination of those disqualifying circumstances did moreover deprive Appellant of procedural due process, a violation of both the due process clause of the Fourteenth Amendment to the U.S. Constitution and of Article I, § 9, Florida Constitution."

That motion also cited Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944) and its holding that, where enforcement of a judgment is "manifestly unconscionable," the term of court rule should not be applied.

That motion was accompanied by a certified copy of the court docket recording

the names of the judges, including Judge Mager, who were on the panel and by the affidavit of Miriam Donner verifying that she first learned of the facts disqualifying Judge Mager in September and October, 1997. That affidavit verified that in September, 1997, she learned that, at some unspecified time, Judge Mager had become a member of the law firm of Abrams, Anton, Robbins, Resnick & Schneider. That affidavit verified that said firm had represented Charles Donner (albeit not of record) in his negotiations with Miriam Donner with regard to the claim that was the subject of the suit throughout the period when that claim was in litigation and on appeal. That affidavit also verified that, upon learning of Mager's association with that firm, she initiated a search of the public Florida corporate filings to determine when Judge Mager joined that firm.

According to Miriam Donner's affidavit, as a result of that search, in October, 1997, she learned that, on August 30, 1977, Anton's law firm had filed with the Secretary of State "Articles of Amendment." A certified copy of that record was included in the appendix that accompanied the motion to recall mandate. Those Articles recited that, "on the 15th day of August, 1977," the shareholders of that firm adopted an amendment, changing the name of the firm from "Abrams, Anton, Robbins, Resnick and Schneider, P.A." to "Abrams, Anton, Robbins, Resnick, Schneider and Mager, P.A." (emphasis supplied). That filing was accompanied by an August 24, 1977 letter to the Secretary of State, filed on August 26, 1977 (and also enclosed in the appendix to the motion to recall mandate), cross-referencing the aforementioned "Original and one copy of Articles

of Amendment of Abrams, Anton, Robbins, Resnick and Schneider, P.A."[2],[3]

On December 23, 1997, a panel of judges of the district court of appeal, different than the judges who comprised the panel presiding in 1977, denied the motion (App. I), stating:

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[2] Accompanying that motion was a 1975 Martindale, Hubbell directory listing "Donner Enterprises, Inc." as a "representative client" of that law firm. That motion also noted that the law firm also appeared as counsel for the interests of Charles Donner in In re Estate of Donner, 347 So.2d 436 (Fla. Dist.Ct.App. 1977) and In re Estate of Donner, 364 So.2d 758 (Fla.Dist.Ct.App. 1978), pending throughout the time when the case at bar was pending, and had previously appeared as counsel for him in Donner v. Donner, 276 So.2d 516 (Fla.Dist.Ct.App. 1973).

[3] The appendix to that motion further substantiated that the "Mager" whose name was added to the "P.A." was the same Gerald Mager who was the judge on the district-court-of-appeal panel by including the law firm's Martindale, Hubbell directory listing, a certified copy of the law firms' 1980 Corporation Annual Report filed with the Secretary of State, and Mager's 1978 University of Miami Alumni Directory listing.

> " An appellate court is without jurisdiction to recall its mandate beyond the term of court during which the mandate was issued. State Farm Mutual Ins. Co. v. Judges of District Court of Appeal, Fifth District, 405 So.2d 980, 982 (Fla. 1981). The supreme court explained:
>
> 'All things must have end, even a district court's power to correct inconsistencies. The reasons for this form the bedrock of Anglo-American jurisprudence: 'There must be an end of litigation. Public policy, as well as the interests of individual litigants, demands it, and the rule just is indispensable to such a consummation.' See also, e.g., ... Boyer v. State, 486 So.2d 70 (Fla. 4th DCA 1986).
>
> We have considered Hazel-Atlas Glass Co. v. Hartford-Empire Co., 64 S.Ct. 997 (1994) and deem it inapposite."

That order also noted in passing that "[t]his court's file has long ago been destroyed." However, there continues to exist in the district-court-of-appeal file its docket in the case at bar, showing the names of the judges on the panel, their

rulings, and the dates thereof. Moreover, Miriam Donner moved that court to "reconstitute" its record. Accompanying that motion was a certified copy of that court's August 9, 1977 opinion, again showing (a) the date of the opinion, (b) the per curiam affirmance without opinion, and (c) Judge Mager's participation and concurrence therein. App. VIII.

Supplementing that district-court-of-appeal record is the trial court record that remains extant. Among other things, the trial-court record and transcripts reflect that the suit was for separate maintenance and that, over objection, (a) after the trial judge announced his disqualification, he then "undisqualified" himself and ruled on the merits and (b) at a hearing noticed to hear a motion for temporary maintenance only, the trial court made a final ruling of dismissal,

refusing to recognize Miriam Donner's proofs of marriage. App. XI. The effect of that judgment was to bar her marital right to support and her right of inheritance as widow upon the death of Charles Donner.[4]

Miriam Donner filed timely motions for rehearing and rehearing en banc of the order denying her motion to recall the appellate mandate. Those motions again raised the due process issue as follows:

> "... Liljeberg [v. Health Services Acquisition Corp.], 486

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[4] There were, and upon recall of the mandate would be, several substantial grounds for reversal. Some of the supporting authorities are as follows: State v. Schack, 617 So.2d 832 (Fla.Dist.Ct. App. 1993) (judge may not reconsider his orally-announced disqualification), citing Rogers v. State, 341 So.2d 196 (Fla. Dist. Ct.App. 1976), cert. denied, 348 So.2d 953 (Fla. 1977) (same); Hart v. Hart, 458 So. 2d 815 (Fla.Dist. Ct.App. 1984) (judge may not make final ruling at hearing on motion for temporary relief); Ladner v. Plaza Del Prado Condominium Ass'n, Inc., 423 So.2d 927, 929 (Fla.Dist.Ct.App. 1982) (same).

U.S. 865, n. 12,[5] emphasized that its decision had 'constitutional dimensions' [and was not limited just to a construction of § 455(a) and Rule 60(b), quoting Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 825 (1986):

''The Due Process Clause 'may bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, 'justice must satisfy the appearance of justice.'"

" In that regard, without reference to whether Judge Mager's failure to disqualify himself was "inadvertent" or knowing, that failure gives rise to due-process concerns. Although Appellant's motion ... expressly adverted to the due-process dimensions of the newly-discovered circumstances of Judge Mager's disqualification, the omission from this Court's order of any mention thereof may suggest that the Court has overlooked that issue. [Footnote quoted post] None of the cases, cited in this Court's order,

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[5] Liljeberg had also been cited and discussed in Miriam Donner's motion to recall mandate.

> hold (contrary to Liljeberg) that constitutional due-process requirement must yield to the (not-constitutionally-based) 'term-of-court' rule."

The footnote omitted from the above quoted excerpt (but accompanying the quoted text) was as follows:

> " Footnote 3 at p. 10 of Appellant's motion for recall points out that Liljeberg's (due process) concerns about 'maintain[ing] public confidence in the judiciary' is cited in Matter of Continental Airlines, 981 F.2d 1450, 1462 (5th Cir. 1993) and that Continental analogously held a judge to be disqualified by his employment with a party's law firm shortly after issuing an order in the case."[6]

Those motions for rehearing and for rehearing en banc were denied on January 30, 1998 by the district court of appeal without any additional opinion. App. IX. That order also denied Petitioner's motion

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[6] Continental had also been cited and discussed in Petitioner's antecedent motion to recall mandate.

to reconstitute the record.

Petitioner's ensuing petition to the Florida Supreme Court for discretionary review of the order denying her motion to recall the mandate was denied. App. VI.

REASONS FOR GRANTING CERTORARI REVIEW

The Due Process issues timely raised in this case merit certiorari review.

I. WHERE PETITIONER DISCOVERED, THROUGH THE EXERCISE OF DILIGENCE, FACTS RELATING TO JUDGE'S DISQUALIFICATION ONLY AFTER EXPIRATION OF TERM OF COURT DURING WHICH MANDATE WAS ISSUED, STATE COURT CANNOT EVADE ISSUE OF WHETHER JUDGE'S PARTICIPATION IN DECISION CONSTITUTED DUE-PROCESS VIOLATION BY INVOKING TERM-OF-COURT RULE

The district court of appeal's threshold determination that it was without jurisdiction to recall its mandate abrogated its responsibility to confront on the merits whether there was a denial of due process -- and, if such a denial were found to exist, to recall its mandate. Where due process is violated, it

would be a further denial of due process to hold that this violation could be procedurally insulated from correction by the happenstance that the court's term expired before Petitioner, through the exercise of diligence, discovered the violation. The Florida court's perceived jurisdictional barrier would apply with equal force to bar all post-term-of-court motions to recall mandate -- even if the concealed facts concerning the judge's disqualification and the attendant due process violation would, through the exercise of diligence, have been discovered and the motion to recall mandate filed, not 20 years later, but rather just one day after expiration of the term of court during which the mandate was issued. There is no rational basis to invoke any such procedural device to deny relief from a denial of due process. See Marshall v. Amos, 442

P.2d 500 (Okla. 1968), vacating an appellate decision **12 years later** when judge was discovered to have been bribed. Specifically in the context of a due process violation, Simer v. Rios, 661 F.2d 655, 663 (7th Cir. 1981) held that, without reference to any rule of court, a court is empowered to vacate a judgment that is the product of a denial of due process.

In the parallel context of a fraud on the court discovered nine years after expiration of the term of court in which the judgment was entered, Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944) recognized an exception to the term-of-court rule

> "... to fulfill a universally recognized need for correcting injustices which, in certain instances, are deemed sufficiently gross to demand a departure from rigid adherence to the term rule. Out of deference to the deep rooted policy in favor of the repose of judgments en-

> tered during past terms, courts of equity have been cautious in exercising their power over such judgments. [Citation omitted] But where the occasion has demanded, where enforcement of the judgment is 'manifestly unconscionable," [citation omitted] ..., they have wielded the power without hesitation."

Without explanation, the court below rejected Hazel-Atlas as "inapposite."

More recently, Hazel-Atlas' holding has been cited with approval in Chambers v. Nasco, Inc., 501 U.S. 32, 44 (1991).

Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988) held that after-discovered facts disqualifying the judge who had entered the judgment warranted post-judgment relief therefrom, even though the affirmance of the judgment had become final on appeal ten months earlier in a prior term of court.

II. DUE-PROCESS GUARANTEES BARRED JUDGE MAGER'S PARTICIPATION IN THE CASE CONTEMPORANEOUS WITH HIS NEGOTIATION FOR EMPLOYMENT, AND EMPLOYMENT, AS A NAME MEMBER OF A LAW FIRM REPRESENTING THE OPPOSING PARTY IN REGARD TO THAT CASE AND OTHER CASES

Footnote 12 to Liljeberg, at 865, quoted Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1986), as follows:

> "The Due Process Clause 'may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, 'justice must satisfy the appearance of justice.'"

Liljeberg, 486 U.S. at 861, also reasoned that, in regard to matters affecting his qualification, a judge is required "to take the steps necessary to maintain public confidence in the judiciary." Liljeberg's above-quoted reasoning was paraphrased in Matter of Continental Airlines, 981 F.2d 1450, 1462 (5th Cir. 1993) as obligating a judge to disqualify himself

because he accepted employment with a party's law firm shortly after issuing the order in the case. In Pepsico, Inc. v. McMillen, 764 F.2d 458, 461 (7th Cir. 1985), the judge was disqualified even though he disclosed the fact that his agent had negotiated in his behalf for employment with the parties' respective law firms. All the more egregious are the allegations and proofs relating to the concealed facts concerning Mager's negotiation for employment and employment as a name member of the opposing party's law firm contemporaneous with his participation in the appeal. He was thereby tainted with a direct pecuniary interest in the litigation. That strikes at the very foundation of our judicial system and at basic notions of due process. In re Murchison, 349 U.S. 133, 136 (1955) stated:

"... our system of law has al-

> ways endeavored to prevent even the possibility of unfairness. To this end ... no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'every procedure which would offer a possible temptation to the average man as a judge ... not to hold the balance nice, clear, and true ... denied ... due process of law.'"

Murchison is quoted and adhered to in Louk v. Haynes, 159 W.Va. 482, 223 S.E.2d 780, 791 (1976). Just such a "possible temptation" was posed by Judge Mager's "interest" in the opposing party's law firm.

III. WHERE DUE-PROCESS CONCERNS DISQUALIFY JUDGE WHOSE PARTICIPATION WAS ESSENTIAL TO QUORUM, HIS DELIBERATIONS AND VOTE WITH OTHER JUDGES IN PANEL INVALIDATE THE PANEL DECISION AS A DENIAL DUE PROCESS

In Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1986), a split Alabama Supreme Court decision was reversed as a denial of due process where a disqualified Alabama Supreme Court Justice cast the deciding

vote. The concurring opinions in Aetna reasoned that the participation of the disqualified judge in the decision prejudiced the entire panel regardless of whether he cast the deciding vote.[7] The majority in Aetna, at 827, withheld ruling on whether to treat as a denial of due process an appellate decision in which the disqualified judge's vote was not the deciding vote, citing Langer v. Kositzky, 38 N.D. 616, 166 N.W. 534 (1918), Oakley v. Aspinwall, 3 N.Y. 547 (185), and 48A C.J.S. Judges § 159.

In Langer, it was brought to the attention of the original panel of judges that one of the judges who participated in

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[7] Just as there were substantial state-law questions that confronted the Alabama Supreme Court in Aetna, so, in the appeal from the trial court's judgment of dismissal in the case at bar, there were several substantial state-law grounds for reversal. See footnote 4, ante.

the decision was disqualified. The remaining judges on that panel held that since the disqualified judge did not cast the deciding vote and since his participation was not essential to form a quorum, the decision would not be vacated.[8] Langer is distinguishable from the case at bar on each of the following two grounds:

(a) Judge Mager's participation in considering the appeal was essential to the three-judge district-court-of-appeal quorum under Fla. Const. art. V § 4(a);

(b) in Langer, the judges who deliberated with the disqualified judge were still on the panel on rehearing and as such were able to determine of their own personal knowledge that the disqualified

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[8] Sands v. Wainwright, 491 F.2d 417, 424 (5th Cir. 1973) recognized that where a three-judge quorum is required, the requirement is "jurisdictional" and renders a decision of a quorumless panel "void."

judge did not prejudicially influence their vote. By contrast, in the case at bar, the judges who deliberated with Judge Mager were no longer on that court when the motion to recall mandate was filed.

In Oakley, the New York court held that the disqualified judge's participation in the appellate panel decision invalidated the decision; the majority did not rule on whether his disqualification deprived the panel of the required quorum but two concurring judges did rule that the disqualification deprived the panel of the required quorum. Langer and Oakley are cited in 48 C.J.S. Judges § 159.

Also cited in that annotation is a Florida Supreme Court decision, Caples v. Taliaferro, 146 Fla. 122, 200 So. 378 (1941). In Caples, one of the Justices of that court who participated in that decision was disqualified. When that fact was

brought to the attention of that court, the remaining Justices who had participated in the decision determined that the disqualification had no effect on the decision because the disqualified Justice was not essential to a quorum. Id., at 380 and 382. Caples is distinguishable from the case at bar for the same reasons that distinguish Langer.

In the only other two cases cited in 48A C.J.S. Judges § 159 that merit comment, the disqualified judges sat "pro forma" either by statute or by stipulation to constitute the needed quorum but did not participate in the decision: Nephi Irr. Co. v. Jenkins, 8 Utah 452, 32 P. 699 (1893) (by statute); Walker v. Rogan, 1 Wis. 511 (1853) (by stipulation).

Not a single case, cited in 48A C.J.S. Judges § 159, reached a result consistent with the result reached in the

court below; not a single one of those cited cases allowed to stand a decision in which there "participated" in the deliberations and vote a disqualified judge whose presence was necessary to form a "quorum."

The significance of the quorum to this due process analysis is that, just as the deciding vote was crucial to the decision in Aetna, so the participation of a judge essential to the quorum is equally crucial to the decision.

This same subject is also annotated in 46 Am.Jur.2d Judges § 232 and at Annot. 29 A.L.R.5th 722 (1995). Among the cases annotated therein are the following: Marshall v. Amos, 442 P.2d 500 (Okla. 1968) (vacating an appellate decision **12 years later** when judge casting decisive vote was discovered to have accepted a bribe); Regional Sales Agency, Inc. v. Reichert, 830 P.2d 252 (Utah 1992), (vacating a

panel decision where disqualified judge participated in, and authored, decision); Parham v. Church Mut. Ins. Co., 53 Ark. App. 194, 922 S.W.2d 724 (1996) (where judge who authored opinion was disqualified, entire panel was disqualified, and panel decision was vacated); State ex rel. Getchel v. Bradish, 95 Wis. 205, 70 N.W. 172 (1897) (disqualification of one member of three-member board disqualified board); Harris v. Champion, 15 F.3d 1538 (10th Cir. 1994) (where one of three judges on panel was disqualified, panel decision was subject to de novo review); Nalle v. Austin, 85 Tex. 520, 22 S.W. 668 (1893) (where only two judges were required for a quorum, participation of third judge who was disqualified did not invalidate panel decision); Bracey v. Gray, 71 Cal.App.2d 206, 162 P.2d 314 (1945) (disqualified judge did not participate and was not

needed for quorum); Goodhart v. Casey, 523 Pa. 188, 565 A.2d 757, 761-762 (1989) [decision not vacated where two members of panel who were disqualified were "superfluous" to a quorum (and after disqualification did not participate on rehearing)].

The only annotated cases allowing a panel decision to stand in spite of the disqualification of one of the participating judges who was essential to a quorum are Gorrill v. Whittier, 3 N.H. 265 (1825) and Boyer v. State, 486 So.2d 70 (Fla. Dist.Ct.App. 1986). The order of the district court of appeal, refusing to recall the mandate in the case at bar on jurisdictional grounds, cited Boyer, prefaced by the signal "See, e.g." That same court had previously decided Boyer. Boyer reasoned that the circumstances disqualifying one of the judges on that panel did not rise to the level of a denial of "due

process" because they occurred 16 years before that judge participated in the panel decision. The circumstances, disqualifying Judge Mager in the case at bar, occurred contemporaneous with his participation in the panel decision and otherwise differ markedly from those in Boyer.

The New Hampshire court's pre-Fourteenth Amendment decision in Gorrill alone held that the participation of a disqualified judge who formed part of the quorum, though erroneous, did not render the proceeding "void."

Omitted from the foregoing annotations is any citation to Stockwell v. Township Board of White Lake, 22 Mich. 341 (1871). Stockwell held that participation in a proceeding, that was judicial in nature, by an officer who was disqualified and **who formed part of the needed quorum** rendered that proceeding void.

Thus, Aetna's majority and concurring opinions, the authorities cited therein, and case law in general all support the following conclusion: where due process grounds to disqualify a judge, who was both essential to a quorum and participated in the decision, are discovered after that decision and promptly brought to the court's attention, due process requires that the decision be vacated. In the case at bar, the court's reliance on the term-of-court rule in refusing even to consider on the merits this due-process issue was itself a further denial of due process.

IV. CONCLUSION

The foregoing analysis shows that the decision below conflicts with decisions of this Court and of state courts of last resort on important constitutional issues that merit certiorari review.

Respectfully submitted,

Miriam Donner, Petitioner
P. O. Box 1232
Hallandale, Florida 33009

IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA FOURTH DISTRICT,
P.O. BOX 3315, WEST PALM BEACH, FL 33402

MIRIAM DONNER,

Appellant,

v. CASE NO. 76-1708

CHARLES DONNER,

Appellee.
_____/

December 23, 1997
BY ORDER OF THE COURT:

Appellant's motion to recall mandate and declare mandate void is denied.

This court's file has long been destroyed.

The panel denied rehearing on September 15, 1977, and again on September 21, 1977. Thereafter, Ms. Donner sought review in the Florida Supreme Court. The supreme court denied review in February 1978. This court's mandate issued on February 17, 1978.

An appellate court is without juris-

diction to recall its mandate beyond the term of court during which the mandate was issued. State Farm Mutual Ins. Co. v. Judges of District Court of Appeal, Fifth District, 405 So.2d 980, 982 (Fla. 1981). The supreme court explained:

> All things must have end, even a district court's power to correct inconsistencies. The reasons for this form the bedrock of Anglo-American jurisprudence: 'There must be an end of litigation. Public policy, as well as the interests of individual litigants, demands it, and the rule just is indispensable to such a consummation.' Lovett v. State, 29 Fla. 384, 401, 11 So. 176, 179 (1892).

See also, e.g., Washington v. State, 92 Fla. 740, 110 So. 259 260-261 (1925); Thompson v. Singletary, 659 So.2d 435 (Fla. 4th DCA 1995); Boyer v. State, 486 So.2d 70 (Fla. 4th DCA 1986).

We have considered Hazel-Atlas Glass Co. v. Hartford-Empire Co., 64 S.Ct. 997 (1994) and deem it inapposite.

ORDERED that appellant's November 3, 1997, motion for leave to amend motion is hereby granted. Further,

ORDERED that appellant's December 2, 1997, motion to substitute parties is denied as moot.

I hereby certify the foregoing is a true copy of the original court order.

/s/
MARILYN BEUTTENMULLER
CLERK

cc: Miriam Donner
L.J. Cushman
Bruce Lazar
Jonathan Feuerman

/CH

IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA FOURTH DISTRICT,
P.O. BOX 3315, WEST PALM BEACH, FL 33402

MIRIAM DONNER, CASE NO. 76-1708

Appellant(s),

v.

CHARLES DONNER, L.T. CASE NO. 76-3759

Appellee(s). BROWARD

January 30, 1998

BY ORDER OF THE COURT:

ORDERED that appellant's motion filed December 30, 1997, for rehearing is hereby denied; further,

ORDERED that appellant's motion filed December 30, 1997, for rehearing en banc is hereby denied; further,

ORDERED that appellant's motion filed December 30, 1997, for certification is hereby denied; further,

ORDERED that appellant's motion filed December 30, 1997, to reconstitute record is hereby denied.

I hereby certify the foregoing is a true copy of the original court order.

/s/
MARILYN BEUTTENMULLER
CLERK

cc: Miriam Donner
Bruce Lazar
Jonathan Feuerman
L.J. Cushman
Robert E. Lockwood, Clerk
/CH

SUPREME COURT OF FLORIDA

Monday, May 1, 1998

MIRIAM DONNER,	*	
	*	
Petitioner,	*	CASE NO. 92,543
	*	
v.	*	District Court of
	*	Appeal, 4th
CHARLES DONNER,	*	District - No.
	*	76-1708
Respondent.	*	

* * * * * * * * * * * *

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

OVERTON, HARDING, WELLS, ANSTEAD and PARIENTE, JJ., concur

A True Copy

TEST

SEAL

/s/
Sid J. White
Clerk, Supreme Court

BH
cc: Hon. Marilyn N. Beuttenmuller, Clerk
Hon. Robert E. Lockwood, Clerk
w/copy to Circuit Judge
Ms. Miriam Donner
Mr. L. J. Cushman
Mr. Jonathan Feuerman

IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA FOURTH DISTRICT,
JULY TERM 1977

MIRIAM DONNER,)
)
Appellant,)
)
v.) CASE NO. 76-1708
)
CHARLES DONNER,)
)
Appellee.)

Decision filed August 9, 1977

Appeal from the Circuit Court
for Broward County;
Thomas J. Reddick, Jr., Judge

Miriam Donner, Hallandale,
pro se.

L. J. Cushman of Cushman & Cushman,
Miami, for appellee.

PER CURIAM.

AFFIRMED.

ALDERMAN, C.J., MAGER and DAUKSCH, JJ.,
concur.

MANDATE

from

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT

TO THE HONORABLE, THE JUDGES OF: The Circuit Court for Broward County.

GREETINGS:

WHEREAS, in that certain cause filed in this court styled:

Miriam Donner

v.

Charles Donner

Case No. 76-1708

Your Case No. 76-3759

The attached opinion was rendered on August 9, 1977

YOU ARE HEREBY COMMANDED that such further proceedings be had in said cause in accordance with the decision and judgment of this court, the rules of procedure and the laws of the State of Florida.

WITNESS the Honorable James E. Alderman Chief Judge of the District Court of Appeal of the State of Florida, Fourth District and the seal of said Court at West Palm Beach, Florida, on this 17th day of February, 1978.

SEAL

/s/
Clerk of the District Court of Appeal of the State of Florida, Fourth District

IN THE CIRCUIT COURT OF THE
17TH JUDICIAL CIRCUIT IN AND
FOR BROWARD COUNTY, FLORIDA

CASE NO. 76-3759 (Reddick)

MIRIAM DONNER,	:	
Plaintiff,	:	
vs.	:	JUDGMENT ON APPLICATION
CHARLES N. DONNER,	:	FOR SEPARATE MAINTENANCE
Defendant	:	

The above entitled cause coming on to be heard upon the Motion for Temporary Maintenance filed by the Plaintiff, Miriam Donner, upon consideration of the testimony and evidence offered by the respective parties, the Court finds that at the time the above entitled suit was filed Plaintiff, Miriam Donner, and Defendant, Charles N. Donner, were not husband and wife and that said Plaintiff and Defendant never had been husband and wife prior to

the filing of the above entitled suit. Upon consideration thereof the Court finds that Plaintiff is not entitled to any of the relief sought by her Complaint and it is therefore

CONSIDERED, ORDERED and ADJUDGED as follows:

(1) That the said Motion for Temporary Maintenance be and the same is hereby denied.

(2) That the above entitled suit and Plaintiff's Complaint be and the same are hereby dismissed with prejudice at Plaintiff's cost.

DONE and ORDERED at Fort Lauderdale, Broward County, Florida, this 7 day of June, 1976.

Thomas Reddick
CIRCUIT JUDGE